

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CRM-M No.48584 of 2017

Date of decision : 21.05.2018

Sonu alias Kallu

.....Petitioner

Versus

Union Territory Chandigarh

...Respondent

CORAM : HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present : Mr. Ashish Aggarwal, Advocate for the petitioner.

Mr. Yashwant S. Rathore, Addl. P.P., U.T., Chandigarh.

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DAYA CHAUDHARY, J. (Oral)

Petitioner has filed this petition under Section 439 of the Code of Criminal Procedure, 1973 for grant of regular bail to him in case FIR No.116 dated 26.06.2017 under Sections 21 and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short – 'the NDPS Act') registered at Police Station Maloya, Distt. Chandigarh (U.T.) during pendency of the trial. Petitioner has further prayed for grant of interim bail to him in view of judgment of this Court passed in case ***Inderjeet Singh alias Laddi and others Vs. State of Punjab 2014 (3) R.C.R. (Criminal) 953***, as report from the office of the Chemical Examiner has not been received.

Learned counsel for the petitioner submits that the petitioner

has falsely been implicated in the case, whereas he was not involved. The alleged recovery has been implanted upon the petitioner, whereas as per allegations in the FIR, the recovery of 196 intoxicant injections as well as 14 grams of heroin have been shown to be recovered from a barricade laid by the police officials in Sector 38–West, Chandigarh. Learned counsel further submits that the petitioner has no previous criminal record as no other case of NDPS Act has been registered against him. Learned counsel submits that the petitioner and his family members did not fulfill the demand of local police for ulterior motive and in such situation, false case has been registered. Learned counsel also submits that earlier also an attempt was made to implicate the brother-in-law of the petitioner in false case and he was confined in illegal detention by the police. Thereafter, he was released by the police. Even, false recovery was shown against his brother-in-law and FIR was also registered under Section 22 of the NDSPS Act. The brother-in-law of petitioner filed CRM-M No.15497 of 2017 and he was granted regular bail vide order dated 18.09.2017 (Annexure P-3). Even the complaint was made by the sister and wife of the petitioner. Thereafter, wife of the petitioner was released on bail vide order dated 13.12.2017 (Annexure P-4). At the end, learned counsel for the petitioner submits that the petitioner was also implicated in a false case without following the mandatory provisions of Section 50 of the NDPS Act as no option was given to him to get his search conducted in presence of a Gazetted Officer or a Magistrate. Even no independent witness was joined by the police party at the time of the alleged recovery effected from the

possession of the petitioner, whereas the place of occurrence was a thoroughfare. The petitioner is in custody since the date of lodging of FIR i.e. 26.06.2017 and trial may take long time to conclude. In support of his arguments, learned counsel for the petitioner has also relied upon judgments of Hon'ble the Apex Court in cases *State of Rajasthan Vs. Parmanand and another 2014 (2) R.C.R. (Criminal) 40*, *Arif Khan alias Agha Khan Vs. State of Uttarakhand Criminal Appeal No.273 of 2007 decided on 27.04.2008* and of this Court in cases *Balinder Singh Vs. State of Haryana 2015 (1) R.C.R. (Criminal) 972*, *Gurpreet Singh alias Gopi Vs. State of Punjab CRM-M No.11968 of 2017 decided on 30.05.2017*, *Jagroop Singh alias JP Vs. State of Punjab CRM-M No.3895 of 2017 decided on 17.03.2017*, *Gurjant Singh Vs. State of Punjab CRM-M No.30224 of 2017 decided on 30.08.2017* and *Sikandar alias Bodha Vs. U.T. Of Chandigarh CRM-M No.15497 of 2017 decided on 18.09.2017*.

Learned State counsel has opposed the submissions made by learned counsel for the petitioner on the basis of seriousness of offence but he has not disputed the period of custody and the fact that no other case of NDPS Act is there against the petitioner. However, he submits that one case under Indian Penal Code is pending against the petitioner, wherein he is on bail.

Heard arguments of learned counsel for the parties and have also perused the documents available on the file including the contents of the FIR.

Admittedly, the petitioner had a legal right to be searched in

presence of a Gazetted officer or a Magistrate but the mandatory provisions of Section 50 of the NDPS Act have not been complied with. Although the Investigating Officer of the case sought an option of the petitioner to be searched in presence of a Gazetted Officer or a Magistrate and the petitioner had stated to opt to be searched by the Investigating Officer. The compliance of mandatory provisions of Section 50 of the NDPS Act has not been made as the police party has not conducted the raid in accordance with the law and procedure prescribed under Section 50 of the NDPS Act. The search was not conducted in presence of a Magistrate or a Gazetted Officer and as such, the alleged recovery of the contraband is contrary to mandatory provisions of Section 50 of the NDPS Act. The powers conferred on the authorities under Section 50 of the NDPS Act are mandatory and it has been settled in various judgments of this Court as well as latest judgment of Hon'ble the Apex Court in *Arif Khan's* case (supra).

The provisions of Section 50 of the NDPS Act is mandatory as it provides that the suspect is to be apprised of his right to be searched before a Gazetted Officer or a Magistrate. Admittedly, in the present case the petitioner was not produced before a Magistrate or a Gazetted Officer. In judgment of *Arif Khan's* case (supra) the option was given to the suspect to be searched in presence of a Gazetted Officer or a Magistrate and in that case also, the suspect showed faith in the Investigating Officer to conduct the search.

However, learned State counsel has submitted that provisions of Section 50 of the NDPS Act are mandatory only in case of personal

search of the accused and not in all the cases.

On perusal of provisions of Section 50 of the NDPS Act it is apparent that the object of the provisions is to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting false cases by the law enforcement agencies. It is imperative on the part of empowered officer to appraise the person intended to be searched of his right to be searched before a Gazetted Officer or a Magistrate. Said provisions are mandatory and it requires a strict compliance and failure to comply with the provision would render the recovery of the alleged contraband suspect and it vitiates the conviction if same is recorded only on the basis of recovery of such contraband from the person of accused during such search, as has been held in judgment of Larger Bench of Hon'ble the Apex Court in case titled as ***Vijaysinh Chandubha Jadeja Vs. State of Gujrat 2010(4) R.C.R. (Criminal) 911.***

There is nothing on record or argued by learned State counsel that the petitioner was searched by a Gazetted Officer or in presence of a Magistrate. Meaning thereby, the provisions of Section 50 of the NDPS Act have not been complied with. No other case of NDPS Act has been pointed out against the petitioner.

Accordingly, the present petition is allowed and the petitioner is directed to be released on regular bail on furnishing adequate bail bonds/surety bonds to the satisfaction of the trial Court.

However, it is made clear that any observation made hereinabove shall not be construed as an expression of opinion on the merits

of the case and the trial Court shall be within its right to adjudicate/
conclude the trial in accordance with law on the basis of evidence as
available on record.

21.05.2018

sunil yadav

**(DAYA CHAUDHARY)
JUDGE**

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No